

June 24, 2016

SENT VIA CERTIFIED MAIL AND EMAIL

Bruce R. Baird, PLLC
2150 South 1300 East, 5th Floor
Salt Lake City, UT 84106

RE: Administrative Interpretation of Nonconforming Use Status for Geneva Rock Products, Inc.

Dear Mr. Baird,

I have reviewed the information you provided on behalf of Geneva Rock Products, Inc. ("Geneva") asking for a determination of the nonconforming use status of approximately 260 acres zoned C-R, M-2, and A-5 (the "260 Acres") and more specifically on the highly contested 40-acre parcel zoned A-5 (the "40-Acre Parcel") (see map). This determination is to evaluate whether the nonconforming use on the 260 Acres is legal or not. It is my determination that Geneva has an established legal nonconforming use for sand, gravel, and rock extraction operations (the "Gravel Operations") on the 260 Acres. My evaluation is outlined below.

A. APPLICABLE CODES:

In my evaluation, I considered several sections of the Draper City Municipal Code (DCMC). The Purpose and Scope sections of Title 9, Chapter 6, Nonconforming Uses, Structures and Lots are referenced.

Section 9-6-010: Purpose, states:

"The purpose of this chapter is to establish regulations governing legally established uses, structures, lots or parcels that do not conform to applicable requirements of this title. They may continue to exist and be put to productive use, but their nonconforming aspects shall be brought into conformance with the requirements of this title as provided in this chapter. The intent of this chapter is to recognize the interests of property owners while controlling expansion of nonconforming conditions." (Emphasis added)

Section 9-6-020: Scope, states:

"The provisions of this chapter shall apply to all lots or parcels, structures, and uses within the city, and to any other matter governed by this title. Any lot or parcel, structure, or use that was legally established on or before the effective date of this title may be continued to the extent that it legally existed on such date and conforms to applicable provisions of this chapter. Any lot, structure, or use which was not authorized by under preexisting zoning ordinance(s), as amended, or which was illegal under such ordinance.

shall remain unauthorized and illegal unless expressly authorized or permitted by the provisions of this title.” (Emphasis added)

Given the sections referenced above, the Zoning Administrator is charged with determining the status of a nonconforming use as per Section 9-6-100, Determination of Nonconforming Status and Section 9-5-130(B), Nonconforming Uses stated below:¹

9-6-100: Determination of Nonconforming Status:

“In all cases, the property owner shall have the burden of establishing that a nonconforming lot, structure, or use lawfully exists under this title.”

9-5-130: Nonconforming Uses:

“A. Purpose: This section sets forth procedures for determining the existence, expansion or modification of a nonconforming use.

B. Authority: The zoning administrator is authorized to make a determination regarding the existence, expansion or modification of a nonconforming use as provided in this section.”

B. NONCONFORMING STATUS:

The question at hand is whether Geneva’s Gravel Operations on the 260 Acres are a legal nonconforming use. In this review, two main areas are considered, the 40-Acre Parcel, and the remaining 220 acres currently zoned M-2 and C-R (the “Remainder Parcel”).

1. Zoning at Draper City’s Incorporation. Draper City incorporated in 1978. According to the City Council minutes from 1978 and 1979, Draper City adopted and followed the Salt Lake County zoning ordinances and zoning map. The City has copies of the Salt Lake County zoning ordinances dated June 15, 1957, October 6, 1966, and March 18, 1977 which controlled the zoning for Geneva’s Gravel Operations prior to Draper City’s incorporation. After Draper City’s incorporation, the City amended the zoning ordinances and maps until the City repealed the old zone classifications and zoning ordinance and adopted new zoning classifications and zoning ordinance in August, 2001.

2. Salt Lake County Zoning. When the Salt Lake County Zoning Ordinance was adopted by Draper City in 1978, a large portion of the 260 Acres was zoned S-1-G. The S-1-G zone was specifically created by Salt Lake County for sand, gravel, and rock extraction operations. This was a permitted use until January 18, 1973 when sand, gravel, and rock extraction operations were changed to a conditional use in the S-1-G zone.

Later, two smaller areas within the 260 Acres were zoned M-2. The exact date Salt Lake County changed these two parcels from S-1-G to M-2 is unknown with the exception of a reference to

¹ The City has received comments and documents from other interested parties regarding the legal nonconforming use determination. I have reviewed the comments and documents and have either found them to be irrelevant to my determination or have addressed the relevant issues in this letter.

the M-2 zone in an ordinance dated April 9, 1976. The M-2 zone allowed crushers and concrete batching plants where those existing operations are approximately located today.

At the time Draper City was incorporated in 1978, the remaining acres of the 260 Acres were zoned A-2. Sand, gravel, and rock extraction operations were not listed as a permitted or conditional use in the A-2 zone. However, from 1953 till 1965, sand, gravel, and rock extraction operations were a permitted use in the A-2 zone. From 1965 to January 18, 1973, sand, gravel, and rock extraction operations were a conditional use in the A-2 zone. On January 18, 1973, Salt Lake County deleted sand, gravel, and rock extraction operations from the conditional use table of the A-2 zone.

3. Draper City Zoning. The earliest zoning map I have been able to find in the city records is a 1984 zone map that shows approximately 150 acres of the 260 Acres zoned as M-2 and the remaining area zoned A-5. On August 17, 1999, the Draper City Council adopted the Southpointe Commercial Rezone which zoned the north 40 acres (the "C-R Area") from A-5 to C-3 (now C-R). The minutes of that meeting clearly recognize the existing operations occurring on the C-R Area as legal nonconforming.

4. Analysis:

The primary question is whether sand, gravel, and rock extraction operations were established on the 260 Acres prior to January 18, 1973. As outlined earlier, Section 9-6-100 of the DCMC places the burden of establishing the legal nonconforming use upon the land owner. The information provided by Geneva is thorough and satisfies the "burden" for making the determination and is hereby adopted and incorporated into this analysis. Also, Draper City staff performed a significant amount of research through Salt Lake County Recorder's office and Draper City records to verify the information provided by Geneva.

Primary Evidence of Established Sand, Gravel, and Rock Extraction Operations:

- In 1946, L.E. Miller quit claimed to Hansen Lime and Stucco 80-acres, which included the highly contested 40-Acre Parcel, for the purpose of sand, gravel, and rock extraction operations. This is one of the earliest recorded instruments that define the "tract" for making the nonconforming use determination. There is no history of zoning on the property at this time.
- In 1947, an additional 387 acres was transferred by Warranty Deed from Smith to Hansen Lime and Stucco for the purpose of sand, gravel, and rock extraction operations. This is the second of the earliest recorded instruments that define the "tract" for making the nonconforming use determination on the Remainder Parcel. There is no history of zoning on the property at this time.
- According to a 1953 USDA aerial photograph, sand, gravel, and rock extraction operations appear on the northwest corner of the 80-acre tract establishing the initial Gravel Operations.
- It wasn't until 1953 when the first Salt Lake County zoning appeared on the property. The zone applied at that time is A-2 which allowed "mines, quarries, gravel pits" as a

permitted use in the zone. This fact is confirmed with the 1957 Salt Lake County zoning ordinance and zone map held in the Draper City offices.

- According to a 1965 USDA aerial photograph, sand, gravel, and rock extraction operations appear to be occurring on several acres of the 260 Acres.

Common Law Applicable to Nonconforming Use Determination:

As part of its Request for Administrative Interpretation, Geneva submitted a legal analysis of the Utah Supreme Court case of Gibbons & Reed v. North Salt Lake City, 431 P.2d 239 (Utah, 1967). Gibbons & Reed is the seminal case in Utah addressing the nonconforming status of gravel operations. I find Geneva's analysis of Gibbons & Reed to be correct and adopt the analysis presented by Geneva.

In summary, Gibbons & Reed stands for the proposition that gravel operations are unlike other uses of land in that the use consumes the land as the land itself is a material or resource. The court stated "[u]nder these facts the ordinary concept of 'use' must yield to the realities of business." The court further stated "[t]he very nature and use of an extractive business contemplates the continuance of such use of the entire parcel of land without limitation or restriction to the immediate area excavated at the time the ordinance was passed." Finally, the court concluded "the entire tract is generally regarded as within the exemption of an existing nonconforming use, although the entire tract is not so used at the time of the passage or effective date of the zoning ordinance."

Based upon the records submitted by Geneva, verification through research conducted on the Salt Lake County Recorder's website by Draper City staff, and the legal analysis of Gibbons and Reed, the records prove that sand, gravel, and rock extraction operations occurred on the entire 260 Acres prior to Draper City's incorporation in 1978, and more specifically, prior to January 18, 1973. Therefore, I have determined Geneva's Gravel Operations are a legal nonconforming use on the 260 Acres.

C. CONTINUATION AND EXPANSION OF THE LEGAL NONCONFORMING USE:

1. Expansion of Gravel Operations. The next determination regarding Geneva's Gravel Operations is whether the legal nonconforming use may continue and expand within the 260 Acres. According to Section 9-6-040(C) of the DCMC, a legally established nonconforming use of open land is allowed to continue as stated below:

"A nonconforming use of open land may be continued provided such nonconforming use shall not be expanded or extended into any other portion of a conforming building or open land, and no structures, additions, alterations, or enlargements thereto shall be made thereon, except those required by law."

The first step in the analysis regarding the expansion of the Gravel Operations on open land is deciding whether a legal nonconforming sand, gravel, and rock extraction operation is restricted to the area initially established for operations. Section 9-6-040(D), Expansion of Outdoor Nonconforming Uses states:

“A nonconforming use of a lot or parcel where the principal use is not enclosed within a building, such as a salvage yard or a motor vehicle sales lot, shall not be expanded except in conformity with the requirements of this title.”

In the example listed in the ordinance above, a salvage yard is limited in its ability to expand on open land. However, there is a difference between the use of a lot or parcel as a salvage yard and the use of a lot or parcel for sand, gravel, and rock extraction operations. The Utah Supreme Court has described the difference in the Gibbons & Reed case. Sand, gravel, and rock extraction is the actual material use of the land and may legally expand due to the location of the material versus the salvage yard example where the salvaged vehicles are considered the material use and may not expand beyond the initial established area into open land. Based upon the case law decisions by the Utah Supreme Court, it is my determination that Geneva is allowed to continue the Gravel Operations across the entire 260 Acres, including the 40-Acre Parcel.²

2. Rock crushing, mixing, and concrete batch plant operations. Mixing and concrete batch plant operations were permitted uses in the Salt Lake County 1966 and 1977 M-2 Zone. Rock crushing is a conditional use in the Salt Lake County M-2 zone as well as the Draper City M-2 Zone. Because rock crushing, mixing, and concrete batch plant operations occurred on the site prior to Draper City's incorporation, rock crushing, mixing, and concrete batch plant operations were legal nonconforming. In addition, on January 27, 1987, Geneva obtained site plan approval for a new asphalt plant. In 1999, Geneva obtained site plan and conditional use permit approval for the expansion of rock crushing, mixing, and concrete batch plant operations making them legal uses in the Draper City M-2 Zone.

D. SUMMARY:

In summary, based upon the finding listed in this letter of determination from the information provided by Geneva, Draper City Staff research, and applicable case law, I find the following:

1. Geneva maintains a legally established nonconforming use of open land for sand, gravel, and rock extraction operations on the 260 Acres as requested.
2. Geneva is allowed to expand sand, gravel, and rock extraction operations into open land on the 260 Acres.
3. Crushing, concrete mixing, and batch plant operations are a legal conforming use in the M-2 Zone and may continue without restriction regardless of whether material is obtained on-site, brought in by conveyor, or brought in by truck.
4. Expansion of sand, gravel, and rock extraction operations into the 142 acres referenced

² Geneva acquired approximately 142 additional acres in 1999. This property is generally located east and northeast of the 260 Acres. Although not part of Geneva's application, it is my determination the expansion of the Gravel Operations into the 142 acres is not allowed due to the following reasons:

- Property is zoned A-5 which does not permit sand, gravel, and rock extraction operations.
- Property was acquired in 1999, twenty-one (21) years after the city incorporated.
- Through the evaluation of the 260 Acre legal nonconforming use determination, no evidence is present of any sand, gravel, and rock extraction operations on the 142 acres.

Expansion of sand, gravel, and rock extraction operations into the 142 acres will require a rezone to M-2 and will also require a conditional use permit before any operations are allowed to commence on the property.

above in Footnote 2 will require a rezone to M-2 and will also require a conditional use permit before any operations are allowed to commence.

E. APPEALS:

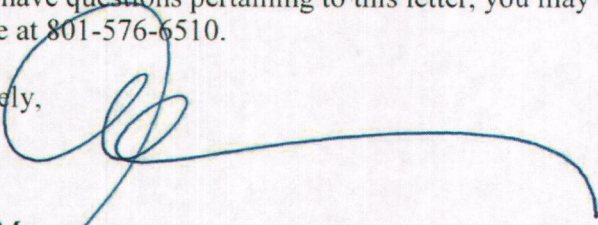
Section 9-6-140, Appeals states:

“Any person aggrieved by a decision of the zoning administrator or other official enforcing the provisions of this chapter may appeal for relief therefrom to the appeals and variance hearing officer as provided in this title.”

A complete application for an appeal shall be filed within fourteen (14) calendar days from the date of this letter. Any person must apply in accordance with the procedures outline in Section 9-5-180(D) of the DCMC.

If you have questions pertaining to this letter, you may e-mail me at keith.morey@draper.ut.us or call me at 801-576-6510.

Sincerely,



Keith Morey
Community Development Director/Zoning Administrator
Draper City

Cc:

Mayor and City Council
David Dobbins, City Manager
Mike Barker, City Attorney
Russell Fox, Assistant City Manager
Jody Burnett, Williams & Hunt
Paul Baker, Division of Oil Gas and Mining
Adrian Dybwad
Robert MacFarlane
Jason Rickabaugh